UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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McKESSON INFORMATION SOLUTIONS, INC.,

Plaintiff,

v.

BRIDGE MEDICAL, INC.,

Defendant.

NO. CIV. S-02-2669 FCD KJM

MEMORANDUM AND ORDER

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This matter is before the court on plaintiff McKesson Information Solutions, Inc.'s ("plaintiff") motion to join Cerner Corporation ("Cerner") as a defendant to this action under Federal Rule of Civil Procedure 25(c).[1] Plaintiff argues said joinder is appropriate because Cerner is now the owner of the accused "MedPoint System" pursuant to the sale of substantially all of defendant Bridge Medical, Inc.'s ("defendant") assets to

[1] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

Cerner. As a result of this "transfer of interest," which plaintiff maintains left defendant as nothing more than a "shell company," the joinder of Cerner, plaintiff argues, is required to grant it full relief in this case.

Both defendant and Cerner oppose the motion, arguing Rule 25(c) is inapplicable here as Cerner is not a successor in interest within the meaning of Rule 25 and even if Rule 25(c) is applicable, the court, in its discretion, should deny joinder at this late stage of the litigation.

For the reasons set forth below, the court DENIES plaintiff's motion to add Cerner as a defendant.

BACKGROUND

In mid-June 2005, defendant and Cerner reached an agreement under which defendant would sell substantially all of its assets to Cerner. (Chou Decl., filed Mar. 1, 2006, ¶ 2.)[2] Press releases were issued on June 16, 2005, and the transaction was major news in the healthcare information technology industry, of which plaintiff is a significant member. The transaction closed on July 7, 2005, and defendant has not made, used, sold, or offered for sale its MedPoint software since that time. (Id.)

In the transaction, Cerner did not assume the liabilities of defendant for its acts prior to the sale of the accused MedPoint business. The transaction was an asset sale, and the liabilities of defendant to plaintiff in this case remain with defendant, according to the terms of the agreement. (Id. at ¶ 3.)

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[2] John G. Chou is Vice President, Deputy General Counsel and Secretary of the AmerisourceBergen Corporation ("ABC"), the parent company of defendant. (Id. at ¶ 1.)

After the transaction, defendant's corporate name was changed to Solana Beach, Inc. The newly renamed defendant entity remained then, and continues now, as a Delaware corporation and a wholly-owned subsidiary of ABC. (Id. at ¶ 4.)

ABC is one of the largest pharmaceutical companies in the United States. It is publicly traded and has a market capitalization in excess of $9.5 billion. "ABC has sufficient resources to satisfy any judgment McKesson secures against Bridge in this case." (Id. at ¶ 5.)

Plaintiff alleges that following the sale of assets from defendant to Cerner, Cerner has marketed, sold, and maintained the "MedPoint System" in hospitals and other medical facilities in the United States, including defendant's former customers.

STANDARD

Federal Rule of Civil Procedure 25(c) provides:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

The determination of whether to join a party pursuant to Rule 25(c) is left to the discretion of the trial court. "The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on his successor in interest even though he is not named." Wright & Miller, Federal Practice and Procedure, Civ. 2d, § 1958. However, the court, if it sees fit, may allow the transferee to be substituted for the transferor or if it wishes, it may retain the transferor as a party and order

that the transferee be made an additional party. Any such "order of joinder is merely a discretionary determination by the trial court that the transferee's presence would facilitate the conduct of the litigation." Id. Rule 25(c) is not designed to create new relationships among the parties to a suit. Rather, it is "designed to allow the [original] action to continue unabated when an interest in the lawsuit changes hands." Matter of Covington Grain Co., Inc., 638 F.2d 1362, 1364 (5th Cir. 1981).

ANALYSIS

Plaintiff offers four reasons why it should be permitted to join Cerner: (1) defendant is unable to satisfy a judgment because Cerner carries on its former business; (2) a separate lawsuit against Cerner deprives plaintiff of injunctive relief; (3) joining Cerner will avoid a multiplicity of actions; and (4) there is no prejudice to defendant or Cerner. The court addresses these reasons in turn.

First, plaintiff argues that without Cerner's joinder it "will be left with an empty victory" because defendant is "now nothing but a shell company." (Mem. of P.&A., filed Feb. 21, 2006, at 2:18-28.) As set forth above, ABC's Vice President, Deputy General Counsel and Secretary, John Chou, declares that defendant is not a shell company but rather, it remains a wholly-owned subsidiary of ABC which is, through ABC, fully capable of satisfying any judgment secured by plaintiff. (Chou Decl., ¶ 4.) Moreover, defendant did not transfer to Cerner its existing liabilities. (Id. at ¶ 3.) In such a case, where defendant "continue[s] in order to discharge its liabilities," a Rule 25(c) joinder is not merited. See Centillion Data Sys., Inc. v.

American Mgmt. Sys., Inc., 200 F.R.D. 618, 620 (S.D. Ind. 2001) (denying Rule 25(c) motion). Plaintiff's reliance on Moody v. Albermarle Paper Co., 50 F.R.D. 494, 498 (E.D. N.C. 2001) is inapposite because the joinder there sought to prevent prejudice to the plaintiff from a "corporate reshuffle," which has not occurred here.

Moreover, Cerner is correct that plaintiff's allegations against it appear to go well beyond a mere successor in interest argument; plaintiff appears, at times, to argue that Cerner is an independent infringer separate and apart from any acquired liability. As such, plaintiff's assertions misconstrue the scope and nature of Rule 25(c). See Matter of Covington Grain Co., 638 F.2d at 1364.

Second, plaintiff contends that it will be denied an injunctive remedy if it must separately sue Cerner. However, plaintiff concedes that any injunctive relief in this case would be extremely limited, if available at all, since the patent expires August 15, 2006 and the estimated five-week jury trial is not set to begin until July 25, 2006. Under these circumstances, this issue does not weigh in favor of joining Cerner.

Third, plaintiff asserts that joining Cerner would avoid a separate lawsuit against Cerner. However, as aptly stated by defendant, this "is not an equity that cuts in [plaintiff's] favor." Plaintiff has known about the sale of the accused "MedPoint System" to Cerner since the summer of 2005. Yet, plaintiff did not move the court to join Cerner until the final pretrial conference, on March 10, 2006, some seven months later and just one month before trial was set to begin on April 18,

2006.[3] Courts have not condoned such belated attempts at joinder under Rule 25(c), even if an additional lawsuit becomes necessary. DeKalb Genetics Corp. v. Pioneer Hi-Bred Int'l, 2001 U.S. Dist. LEXIS 10985, *12, *19 (N.D. Ill. July 31, 2001) (Rule 25(c) motion denied, notwithstanding evidence that "Monsanto owns or controls all [of the litigant's] assets and [the litigant] is a mere shell" given "the late stage of the litigation"); EEOC v. Pan Am. World Airways, Inc., 1987 U.S. Dist. LEXIS 15182, *8-*9 (N.D. Cal. Dec. 1, 1987) (Rule 25(c) motion denied because it is "presented at a very late date" and the proposed new defendant "will have no practical opportunity before trial to respond or to move for summary judgment").[4]

Similarly here, this nearly four year old case is on the verge of trial; the bifurcated court trial is set to commence May 2, 2006 and the jury trial, if necessary, shall commence on July 25, 2006. Motions in limine are to be filed in just two weeks. To add a party at this late juncture is not warranted, particularly where that party, Cerner, intends, upon any joinder order: (1) to request a continuance of the trial to allow it time to retain counsel and review the existing, massive litigation

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[3] This trial date was later continued to May 2, 2006 and July 25, 2006 due to the court's calendar.

[4] Novo Industri A/S v. Travenol Labs., Inc., 211 U.S.P.Q. 379, 380 (N.D. Ill. 1981), relied on by plaintiff, is distinguishable. In Novo, the defendant sold the subject assets the same year the plaintiff filed suit, the plaintiff moved to add the purchaser shortly thereafter, and the joinder occurred long before the close of discovery and some three years before trial.

record in this case,[5] (2) to seek to reopen discovery so that it may propound its own discovery requests, conduct its own depositions, and develop its own theories and defenses, and (3) to challenge the current claim construction, which Cerner argues is not binding on it. All of these actions, which may well be merited, will require a significant investment of judicial time and resources and will complicate and substantially lengthen this case. This delay and cost are alone a sufficient basis for the court to exercise its discretion to deny plaintiff's motion.

For these same reasons, plaintiff's final argument is unavailing. Defendant and Cerner would be prejudiced by the late addition of Cerner as a party to this action under the current trial schedule. To bring Cerner in under that schedule, requiring it to file motions in limine in only two weeks is unreasonable. Inevitably, the trial in this action would need to be continued and discovery opened on at least a limited basis relating to Cerner. This prejudices defendant, who would be required to participate in that discovery and must await trial of this already protracted litigation. Defendant would also likely need to revise its trial strategy to accommodate for the impact of a new defendant. Under these circumstances, the court must deny plaintiff's motion. Plaintiff can be made whole for any alleged infringment by Cerner in a separately filed action. See 35 U.S.C. § 286 (six-year limitations period applies to patent cases).

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[5] Said record includes many bankers' boxes of pleadings, twenty-seven deposition transcripts, and more than 800,000 pages of material produced in discovery by the parties and third parties. (Patino Decl., filed Mar. 1, 2006, ¶ 4.)

CONCLUSION

For the foregoing reasons, plaintiff's Rule 25(c) motion to add Cerner as a defendant to this action is DENIED.[6]

IT IS SO ORDERED.

DATED: March 13, 2006.

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

[6] From the parties' submissions on the motion, it appears they agree that as between plaintiff and defendant a change of the caption in this case is necessary to reflect the current names of the parties. McKesson Information Solutions, Inc. present name is McKesson Information Solutions, LLC and Bridge Medical, Inc.'s present name is Solana Beach, Inc. Should the parties seek to implement this change in the caption, they should file a stipulation and order with the court.